No. 42231-0-II
(consolidated with No. 41811-8-II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GARY SMITH,

Appellant/Respondent,

v.

CLARK PUBLIC UTILITIES, a municipal corporation of the State of Washington,

Respondent/Appellant,

and

CLARK COUNTY, by and through the DEPARTMENT OF CLARK COUNTY PUBLIC WORKS, a political subdivision of the State of Washington,

Respondent.

BRIEF OF RESPONDENT CLARK COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

//////////

Statutes, Regulations and Constitutional Provisions:

Other:

I.

INTRODUCTION

The plaintiff was injured in a house move that occurred on April 10, 2005, while he was working as an employee of Settle Construction d/b/a Northwest Structural Moving ("NSM"). The house was being moved from Camas to a rural area in Clark County. The house was transported over county roads and a state highway. The county issued a permit for the transportation of the house on county roads and the Washington State Department of Transportation ("WSDOT") issued a permit for the transportation of the house over the state highway.

The plaintiff was standing on top of the house as it was being moved. He was injured when he came into contact with a high-voltage utility line owned by Clark Public Utilities ("CPU") that crossed the state highway. The utility line was approximately 6' above the top of the house.

The trial court correctly dismissed the complaint as it relates to Clark County because the county did not owe the plaintiff any duty for the conditions existing on a state highway; the county has no duty, or authority, with respect to the issuance of a permit for a house move on a state highway; and, with respect to the permit that the county did issue, the failure to enforce exception to the public duty doctrine does not apply.

II.

ISSUES RELATING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err in determining that the county did not owe the plaintiff a duty with respect to an accident where the undisputed evidence established that the accident occurred during a house move on a state highway for which the state issued a permit?

2. Did the trial court err in determining that the failure to enforce exception to the public duty doctrine did not apply when 1) there was no violation of the ordinance relating to the issuance of the permit; 2) the ordinance left the determination of the sufficiency of the application for the permit to the discretion of the official issuing the permit; 3) the ordinance did not mandate any specific corrective action; and 4) the ordinance was enacted to protect drivers from the disruption of the use of county roads caused by oversize moves for public, health and safety?

3. Did the trial court err in determining that the county's actions were not a proximate cause of the plaintiff's injuries when the county had no duty to regulate house moves on state highways and the alleged violation of the ordinance (failure to obtain proof that arrangements had been made with the Clark Public Utilities) did not cause

the plaintiff's injuries because, in fact, arrangements had been made with CPU prior to the county's issuance of the permit?

III.

STATEMENT OF THE CASE

In 2005, NSM applied to move two houses along county roads and a state highway (State Route 500). The heights of the two houses and the routes taken for each move were identical. *CP 160-1.* The first move occurred on April 3 without any incident. *CP 160-1.* On the second move, which occurred on April 10, the plaintiff sustained injuries when he came into contact with a high voltage utility line owned by CPU. The utility line was approximately six feet above the maximum height of the house. *CP 143.* The accident occurred at a location more than one-half of a mile after the house move left a county road and entered a state highway. At the point where the road became a state highway, the house move was observed by Mr. Vigna who issued the permit for WSDOT.

According to NSM, the only difference between the first and second move was:

> The only different thing different about the move on April 10th was the position and posture of the employee who was injured. On the April 3rd move, the employee stayed low on the eave of the roof as he had been trained and instructed to do. On the April 10th move, the employee unexpectedly,

> and momentarily, went to the peak of the roof and stood up, resulting in his unfortunate injuries.

CP 161.

The plaintiff claims that the county ordinance relating to house moves was violated because it did not include proof that arrangements had been made with CPU for the disconnection of utilities. However, the undisputed evidence is that NSM worked with CPU for over a month and made all the arrangements required by CPU for the move prior to the county issuing its permit. *CP 76, 160-61, 564, 573-77, 908.*

In its two applications for house move permits submitted to the county and in the application submitted to WSDOT, NSM indicated that the loaded height of the houses was 17'6". *CP 41, CP 568.* NSM further indicated to the county that the houses were "below utility wire height" for both moves. *CP 43-45.* Based on this representation, the county employee responsible for issuing the permits, Shelia Ensminger, determined that it was not necessary to disconnect utilities and no proof of arrangements for their disconnection was required. *CP 38.*

NSM's representation that the 17'6" loaded height of the houses was below utility wire height and would not present a conflict was consistent with Ms. Ensminger's training that anything below 18'6" was below utility wire height. *CP 630.* It was also consistent with the

county's requirement that house movers conduct a "pre-run" of the route using a height pole to check for conflicts. *CP 630.* NSM's representations were also consistent with NSM's experience that the standard height for cable and phone lines is 18'. *CP 155.* They were also consistent with CPU's engineer's statement that the minimum height for utility wires is 18'. *CP 581.*

During the move, the plaintiff was injured, not because the house failed to fit beneath the utility wire. The plaintiff's engineer determined that the utility wire was approximately 6' above the peak of the house being moved. *CP 143.* Rather, the injury occurred because the plaintiff went to the peak of the roof and stood up contrary to his training and employer's instructions. *CP 161.*

IV.

ARGUMENT

A. Standard of Review.

Appellate courts review the entry of summary judgment de novo, engaging in the same inquiry as the trial court. Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). The purpose of summary judgment is to avoid useless trials on issues that cannot be factually supported or, if factually supported, could not, as a matter of law,

lead to a result favorable to the non-moving party. Burris v. General Ins. Co. of America, 16 Wn.App. 73, 75, 553 P.2d 125 (1976). The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The existence of a duty is a question of law for the court. Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

B. The county does not have the authority or duty to regulate house moves on state highways.

There can be no dispute that the accident occurred during a move on a state highway undertaken pursuant to a permit issued by the WSDOT. The accident occurred slightly more than one-half mile (approximately 3,000 feet) after the house left the county road and entered State Road 500. CP 503. Mr. Vigna, from WSDOT, was present at the point where the county road became a state highway and observed the move along the state highway. *CP 503.*

The county does not have the authority, and certainly has no duty, to permit or regulate house moves on state highways. Counties have only those powers that have been granted, either expressly or by reasonable or necessary implication, by the constitution or statutes. State ex rel: Taylor v. Superior Court for King County, 2 Wn.2d 575, 579 (1940). State

highways are constructed and maintained by the state. RCW 48.28.030. WSDOT has the authority to permit the movement of oversize loads on state highways. RCW 46.44.090. WSDOT regulates house and building moves on state highways pursuant to WAC 468-38-360. This authority includes the ability of a WSDOT employee to make a visual inspection of the proposed route "to verify all overhead obstacles, including traffic signals, wires and/or mast arms have been identified and approved for the movement by the region traffic engineer." WAC 468-38-360(6).

The legislature has specified the powers and duties of the county with respect to the construction and maintenance of county roads. RCW 36.32.120 provides that counties have the authority to construct and do all other acts necessary to "county roads within their jurisdiction." RCW 36.75.020 provides that "county roads" in each county shall be constructed and maintained by the legislative authority of the respective county. RCW 36.80.030 provides that the county engineer may certify to the board of county commissioners estimates for the costs of maintaining "county roads." The county has never been granted any authority to construct or maintain state highways.

The clear separation between the county's and the state's authority to regulate their roads was emphasized by WSDOT employee, Mr. Vigna, when he testified:

> . . . my job is to be out there overseeing these moves when they're on our right-of-way . . . I'm there as an inspector, if you will, for the Washington State Dept. of Transportation, overseeing that move because it is in our right-of-way . . . .
>
> Well, this house move, like most all of them, consists of maybe City, County right of ways, as well. We don't care about that. That's not our concern. So we pick up the structure moves when they enter our right of way.

And:

> If it's on our right of way, it's our concern.

And:

> Q. So when you were talking about stoplights earlier, structure coming to a stoplight, if the that's a State stoplight are you concerned, versus it being a City stoplight or something like that?
>
> A. Yeah. We oversee state right of way and state infrastructure.

CP 502-3, 612.

In 1996 AGO No. 17, the Washington State Attorney General issued an opinion that a county does not have the legal authority to maintain a road that is not owned by the county. That opinion concerned whether Benton County had the authority to maintain a federally owned

road within the Hanford Nuclear Reservation. The attorney general, after reviewing the limited authority of counties and the statutes related to county roads, rendered the opinion that the Legislature "plainly" indicated its intent to grant counties the power to construct and maintain only county roads.

In Schinaman v. Skamania County, 23 Wn.2d 904, 162 P.2d 827 (1945), the plaintiff received a verdict granting damages for injuries sustained in a collision with an unguarded obstruction of what was alleged to have been county road. The trial court granted the defendant's motion for judgment, notwithstanding the verdict, based on evidence that the collision occurred on a state highway, rather than a county road. On appeal, the judgment, notwithstanding the verdict, was reversed because the record established that the state highway had been abandoned two years prior to the accident. Pursuant to Rem. Rev. Stat., Vol. 7A, § 6450-10, a portion of the state highway certified as being no longer necessary to the state highway system became a county road. Thus, the county had a duty to maintain the road. Of course, in the present case, the accident site is a part of the state highway system and it has never been abandoned by the state or accepted by the county.

Other jurisdictions have ruled that cities or counties have no duty to maintain state highways. In La Fever v. Sparks, 88 Nev. 282, 496 P.2d 750 (1972), the court held that a city could not been held liable for failing to replace a stop sign on a state highway. In McNulty v. Pennsylvania, 314 F.Supp. 1274 (E.D. Penn., 1970), the court held that a county and a township could not be held liable for failing to inspect, maintain or repair a state road. *Citing,* Stevens v. Reading St. Railway Co., 384 Pa. 390, 121 A.2d 128 (1956); Crawford v. Rochester Borough, 182 Pa. Super. 409, 127 A.2d 810 (1956); and Livingston v. County of Fayette, 204 F.Supp. 927 (W.D. Pa. 1962). In Gilespie v. Los Angeles, 36 Cal.2d 553; 225 P.2d 522 (1950), the court held that a city could not be responsible for the defective condition on a state highway. The court reasoned that a city could not be liable for a dangerous condition nor the failure to warn of it where the city did not have the authority to remedy the condition. The same reasoning applies to the current case. That is, the county cannot be liable for the negligent permitting of a house move across a state highway where the county does not have the authority to grant permits for house moves on state highways.

The plaintiff argues that the county has "jurisdiction" to regulate house moves on state highways because the county code requires the

applicant to provide "proof of arrangements with utilities *without reference* to whether those utilities span County roads or State roads" [1]; applicants are required to provide maps of the entire route; and a code provision that provides that state law prevails over the county code with respect to moves occurring on a state highway.[2] Of course, the source of county authority is the constitution and the state legislature. The county cannot confer upon itself the authority to authorize house moves upon state roads. Additionally, the county code is clear that it is only regulating house moves on county roads. The ordinance states that it is enacted to address the "interruption of the County right-of-way" by house moves. *CP 9.* It also states that the enactment of the ordinance is for the benefit of the public's "use of the County right-of-way." *CP 9-10.* The ordinance requires permits for oversized loads "on the streets, roads, highways, and rights-of-way of Clark County." *CP 13.* Type B (structure) permits are required for "all structure moves which use the County right-of-way to move the structure or building from one place to another." *CP 20.* The foregoing provisions of Ordinance No. 1997-12-11 make it abundantly clear that the county code is only regulating oversized and

[1] *See,* Brief of Appellant at pages 19-20 *(plaintiff's emphasis).*
[2] *See,* Brief of Appellant at page 20.

structure moves on county roads, not state highways.

The plaintiff acknowledges that the question of the county's duty and authority to regulate moves on state highways presents "pure questions of law."[3] The county agrees. The county clearly did not have the authority, and had no duty, to regulate house moves on state highways. The undisputed facts are that the accident occurred on a state highway and that WSDOT issued the permit for the house move on State Route 500 where the accident occurred. Whether characterized as a finding of fact or conclusion of law, the trial court correctly concluded that "Clark County did not have a duty with respect to state road conditions or the permitting of house moves on a state road." *CP 692.* The order granting summary judgment should be affirmed.

C. The Public Duty Doctrine and the failure to enforce exception.

The threshold determination in any negligence action is whether a duty of care is owed by the defendant to the plaintiff. Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Where the defendant is a governmental entity, a duty must be owed to the injured plaintiff individually, and not to the public in general. Taylor at 763 (*quoting,* J &

[3]*See*, Brief of Appellant at page 19.

B Dev. Co. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983), *overruled on other grounds* by Taylor. The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability. Taylor at 169. Fishburn v. Pierce County, 161 Wn.App. 452, 464, 250 P.3d 146 (2011). The existence of a duty is a question of law. Taylor at 168. Fishburn at 464.

It is worth noting that Taylor, like the present case, concerned allegations of negligent permit issuance. The court held, "[t]he duty to ensure that buildings comply with county and municipal building codes rests with individual builders, developers and permit applicants, not local government..... We hold that Stevens County cannot be held liable for its alleged negligence in administering its building code." Taylor, at 161.

The plaintiff argues that the public duty doctrine should be abolished.[4] This court recently rejected this very argument in Johnson v. State of Washington, 164 Wn.App. 740, 752, 265 P.3d 199 (2011). It should be rejected here.

[4]*See*, Brief of Appellant at page 6.

The failure to enforce exception to the public duty doctrine does not apply unless:

1) A public official has a duty to enforce the statute;

2) The official has actual knowledge of a statutory violation,

3) The official fails to take a mandatory specific action to correct the violation, and

4) The plaintiff is within the class the statute protects.

Smith v. City of Kelso, 112 Wn.App. 277, 282, 48 P.3d 372 (2002). The plaintiff has the burden of establishing each element of the exception. Atherton Condominium Apartment Owners Ass'n Bd. of Dir. v. Bloom Dev. Co., 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Washington courts construe the failure to enforce exception narrowly. *Id.* The failure to enforce exception does not apply if the statute vests the public official with broad discretion regarding how to act. *Id.*

1. The plaintiff has not met his burden to establish a violation of the county code.

A review of the facts and the county code demonstrate that no violation of the county code occurred.

Clark County Code ("CCC") 10.06A.020 provides that:

> Permit applicants must submit all information requested by the department of public works . . . . Failure to provide the

> requested information will result in the denial of the permit application.

CP 10. At first blush, it can be seen that the requirement is only to provide the information actually "requested by the department." At issue in this case is the requirement to provide information related to making any necessary arrangements for the disconnection of utilities. The requirement for this information is found at CCC 10.06A.070(C)(11), which states as follows:

> Arrangements for the **disconnection** and connection of any utilities or other facilities in the right-of-way shall be the responsibility of the permittee and any expenses in connection therewith shall be paid by the permittee. The permittee and/or permit applicant shall bring **proof acceptable** to the director of public works or his designee that demonstrates that the **necessary arrangements** with the utilities or other facilities have been made. *(Emphasis added.)*

CP 25-6. The county code vests the public official with discretion in determining if arrangements for the disconnection of utilities are necessary and, if so, what proof of arrangements is acceptable.

In this case, the permit applicant indicated that the loaded height of the house was 17'6" and that it was "below utility wire height." Given this information, Ms. Ensminger, the staff person who processed the application, determined that disconnection of the utilities was not

necessary and did not require additional information. *CP 38.* In her declaration, she stated that:

> As the employee reviewing permits, I relied on Northwest's representation in fulfilling their responsibility regarding utilities. Based on their permit application, there was no issue with utility wires, as the house was "below utility wire height." I, therefore, did not require additional proof of arrangements with utilities.

CP 38. An official processing permit applications is entitled to rely upon the applicant's factual representations. In Meaney v. Dodd, 111 Wn.2d 174, 180, 759 P.2d 455 (1988), the court stated:

> A governmental authority is entitled to rely upon statements made by a permit applicant and has no duty to verify them.

NSM's representation that the maximum height of the house was 17'6" and that it was below utility wire height was consistent with Ms. Ensminger's training that utility wires must be a minimum of 18'6" above the roadway. *CP 630.*

CCC 10.06A.020 only requires the permit applicant to submit information "requested by the department." CCC 10.06A.070(C)(11) only requires proof of "necessary" arrangements for the disconnection of utilities. It also leaves what proof is "acceptable" to the discretion of the official. Based on the information provided by NSM, which Ms. Ensminger was entitled to rely on, there was no need to disconnect

utilities. The information demonstrated that the house would pass below the utilities and not interfere with them. Thus, proof of arrangements for utility disconnection was not necessary. It must be kept in mind that the purpose of the ordinance is disruption of traffic flow, not to enforce electrical standards or WISHA requirements.

Not even the plaintiff's electrical engineer supports the argument that disconnection of the utility was necessary. In his declaration, Mr. Johnson, P.E., faults CPU for not requiring the de-energizing, raising or insulating of its electrical line. *CP 142.* He does not suggest that it was necessary to disconnect the utility. In fact, he found that the utility wire was approximately 6 feet above the house. *CP 143.*

The information in NSM's application to the county indicated that the move would not disrupt traffic because it would pass below utility wire height. Ms. Ensminger was entitled to rely on this information. She determined that it would not be necessary to disconnect utilities and did not require proof of arrangements for such disconnection. Given these facts and the language of the county code, there was no violation of the code and the failure to enforce exception does not apply.

2. The plaintiff did not meet his burden to establish that Ms. Ensminger had actual knowledge of a statutory violation.

Obviously, if the county code was not violated as argued above, there can be no actual knowledge of such a violation. To prevail on the actual knowledge requirement of the failure to enforce exception, the plaintiff must establish that Ms. Ensminger knew that it was necessary to disconnect the utilities in order to trigger the requirement to require proof of "necessary" arrangements for the disconnection. The only argument that the plaintiff makes that Ms. Ensminger had actual knowledge of the violation of the ordinance is that she knew NSM did not provide her proof that arrangements had been made to disconnect the utilities,[5] ignoring whether such arrangements were necessary or not.

All the information given to Ms. Ensminger established that no arrangements for utility disconnection were necessary. The house was represented to be 17' 6" and "below utility wire height." *CP 41 and 47.* Ms. Ensminger also knew that applicants were required to do a "pre-run" of the route with a height pole to check for clearance. *CP 630.* The representation that a load of 17' 6" would not conflict with utility wires is

[5] *See.* Brief of Appellant at page 23.

also consistent with NSM's experience that the standard height for cable and phone lines is 18'. *CP 155.* It is also consistent with CPU's engineer's statement that the minimum height for utility wires is 18'. *CP 581.* It is also consistent with the plaintiff's engineer who determined that the utility wire was approximately 6' above the peak of the house being moved which would be more than 23 feet above the road. *CP 143.* There is no evidence that Ms. Ensminger had actual knowledge that it would be necessary to disconnect utilities for the house move to occur.

The plaintiff states that Campbell v. City of Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975) is "highly instructive."[6] However, Campbell is easily distinguished from the present case. In Campbell, it was undisputed that the city inspector actually viewed the condition that violated the city's electrical code. The inspector affixed a red tag to the front door of the residence stating, "Wiring running thru creek is unsafe and constitutes a threat to life." Campbell at 3-4. Despite being aware of this condition, the inspector did not sever the electrical connection, as required by the city code. The court distinguished cases cited by the city, noting that an inspection was carried out and a highly-dangerous condition was found to

[6] *See*, Brief of Appellant at page 15.

exist. Campbell at 9. In the present case, there is no evidence that Ms. Ensminger had any knowledge of a dangerous condition, nor is there any evidence that she had knowledge that a disconnection of the utility was necessary in order to require proof that arrangements for the disconnection had been made.

For claims based upon the failure to enforce building code requirements, the plaintiff is required to prove that the government official has "actual knowledge of an inherently dangerous and hazardous condition." Taylor at 171-172; Zimbelman v. Chaussee Corp., 55 Wn.App. 278, 777 P.2d 32 (1989); Waite v. Whatcom County, 54 Wn.App. 682, 686, 775 P. 2d 967 (1989). Proof that information was omitted from an application or was inaccurate is not sufficient. In Zimbelman, the plaintiff complained that a permit was negligently issued because plans submitted with the application failed to include safeguards against fire. The plaintiff argued that submission of the defective plans demonstrated actual knowledge of a defective condition. The court of appeals disagreed. The court found that awareness of a defect in the plans did not constitute actual knowledge of an inherently dangerous and defective condition. It stated, "Even if the County failed to note some defects in the plans, this would not constitute actual knowledge of

inherently dangerous and hazardous conditions created by the contractor." Zimbelman at 283. "Knowledge does not include what an official might have known if he had performed his duties more effectively or vigilantly." Zimbelman at 282. In the present case, even if the plaintiff is correct in asserting that the county official had actual knowledge that the application to move the home did not include required information, this does not constitute actual knowledge of an inherently dangerous and defective condition.

In Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990), the court held that being aware that plans submitted to the city contained errors did not establish actual knowledge of a dangerous condition. The court stated, "the evidence, at most, points to constructive knowledge. Constructive knowledge is, however, not enough." Atherton at 532-33. In the present case, even assuming that not requiring proof of arrangements amounted to an error in the application process, knowledge of this error is not actual knowledge of an inherently dangerous condition. The court stated "we evaluate public policy considerations in determining the existence of a duty." Atherton at 529. There is no public policy reason

why requiring actual knowledge of an inherently dangerous condition should apply to house building, but not to house moving cases.

The plaintiff has not met his burden of proving that Ms. Ensminger had actual knowledge of a violation of the county code or of an inherently dangerous condition. The failure to enforce exception does not apply.

3. The plaintiff did not meet his burden of establishing that the county code imposed a mandatory duty to take a specific corrective action.

The failure to enforce exception applies only when there is a mandatory duty to take specific action to correct a known statutory violation. Donohoe v. State, 135 Wn.App. 824, 849, 142 P. 3d 654 (2006); Halleran v. Nu West Inc., 123 Wn. App. 701, 714, 98 P. 3d 52 (2004). Such a duty does not exist if the government agent has discretion about whether and how to act. Donohoe and Halleran, *supra.* An enforceable duty to act must be a mandatory duty to take a specific action. Where a regulation vests discretion in the government official as to how to act, the failure to enforce exception does not apply. McKasson v. State, 55 Wn.App. 18, 25, 776 P.2d 971 (1989); Forced v. State, 62 Wn.App. 363, 369, 814 P.2d 1181 (1991).

The plaintiff argues that CCC 10.06A.020 and CCC 10.06A.070 (c)(11) require the county to refuse to issue a permit if proof of

arrangements for the disconnection of utilities is not submitted. This is incorrect. As previously explained, CCC 10.06A.070(c)(11) leaves it to the official to determine if arrangements for the disconnection of utilities are "necessary" and, if so, what proof is or is not "acceptable." Obviously, discretion is involved. It does not mandate any specific action. CCC 10.06A.020 provides that a permit will be denied if "all information requested by the department" is not provided. Here, NSM provided all the information request by the department, there was no basis to refuse the issuance of the permit. Therefore, there was no mandatory duty to deny the permit.

Assuming, arguendo that the applicant failed to provide requested information, denial of the permit is not the only action that the official can take. As acknowledged by the plaintiff,[7] the official had the option to conduct additional investigation of a permit application if it is believed that the application or any of its supporting documents are inaccurate. CCC 10.06A.030. In Pierce v. Yakima County, 161 Wn. App. 791, 251 P.3d 270 (2011), the public official had the option of disconnecting a propane line that did not meet code or issuing a notice of violation. In

[7] *See*, Brief of Appellant at page 18.

this circumstance, the court concluded that the code did not impose a mandatory duty to take a specific action.

In this case, Ms. Ensminger had discretion (1) to determine if the disconnection of utilities was necessary; and (2) if disconnection was necessary, to determine what information or "proof" from the applicant was acceptable; and (3) if a violation occurred she could choose among alternate methods of enforcement. In these circumstances, it cannot be fairly concluded that the code imposed a mandatory duty to take a specific corrective action. The failure to enforce exception does not apply.

4. The plaintiff did not meet his burden of establishing that he is within the class protected by the ordinance.

Chapter 10.06A of the Clark County Code was established by Ordinance 1997-12-11. The recitals to the ordinance demonstrate that its purpose was to protect the travelling public from conflicts and disruption caused by oversize load moves. It states:

> Whereas, the County right-of-way is often interrupted by business activities, such as heavy equipment, mobile homes, and other activities that temporarily block or restrict traffic on County streets; and
>
> Whereas, the interruption of business activities often needs the coordination between government units, utilities, and the business community to allow the movement of large equipment, machinery, building, structures, and other oversize loads; and

> Whereas, the process of house moving or building moving requires interruption of the County right-of-way and substantial coordination with County agencies, and the current permit system is inadequate to meet demanding pressure that these moves place on County services and agencies; and
>
> Whereas, the moving of buildings, structures, machinery, or other large objects often temporarily causes an impedance to traffic, limits access to property, and requires detours or additional traffic controls to mitigate the traffic problems created by moving these objects; and
>
> Whereas, it is in the best interests of the public health, safety and welfare for the County Government to be aware of these activities and to regulate the use of the County right-of-way in order to better protect the public; now, therefore, . . .

From the foregoing recitals, it can be clearly seen that the concern of the county commissioners was the disruption of drivers' use of the county right-of-way caused by the movement of oversize loads. The plaintiff was not within the class protected by the ordinance. He was working on a house move that the ordinance protected drivers from.

The plaintiff argues that in addition to protecting the travelling public from the disruption caused by oversize moves, the county code makes reference to the "public health, safety and welfare" and "public safety considerations."[8] However, these references to public health, safety

[8]*See*, Brief of Appellant at page 26.

and welfare do not create a class other than the general public at large. Of course, the very premise of the public duty doctrine is that "a duty to all is a duty to no one." J & B Dev. Co. v. King County, 100 Wn.2d 259, 303, 669 P.2d 469 (1983), *overruled on other grounds* by Taylor, *supra.* The Plaintiff cannot satisfy the fourth element of the failure to enforce exception by simply claiming that he is a member of the public and the ordinance protects the public's health, safety and welfare.

The only other argument that the plaintiff makes to show that he is within a class the ordinance sought to protect is his claim that the code violation constituted "an inherently dangerous and hazardous condition" (*citing,* Atherton) and that "safety standards require a minimum 10' buffer between workers and energized high-voltage wires."[9] There are two flaws in this argument. First, the "inherently dangerous and hazardous condition" referred to in Atherton, has nothing to do with the plaintiff being within the class sought to be protected by the ordinance. Rather, it relates to the requirement that the official have actual knowledge of a inherently dangerous and hazardous condition. Second, the 10' buffer referred to by the plaintiff is not a part of the county code. Rather, it is

[9] *See.* Brief of Appellant at pages 25-26.

part of the Washington Industrial Safety and Health Administration (WISHA) regulations. *CP 142, 156 and 402.* The county does not enforce WISHA regulations and Chapter 10.06A of the county code makes no reference to them. WISHA regulations are administered by the Washington State Department of Labor & Industries. *See,* Chapter 49.17, RCW.

The plaintiff has failed to meet his burden of establishing himself within the class the ordinance intended to protect because:

1) the recitals in the adopting ordinance clearly indicate that the purpose of the ordinance is to minimize the inconvenience caused to drivers on county roads from disruptions and interruptions caused by oversize moves;

2) the ordinance is not intended to enforce WISHA regulations or protect workers engaged in house moves; and

3) the ordinance's references to the public's health, safety and welfare simply establishes an attempt to protect the general public, which is insufficient to create a duty to the plaintiff as an individual.

As the court stated in Atherton, "[t]he plaintiff has the burden of establishing each element of the exception. In addition, we construe this exception narrowly. To do otherwise would effectively overrule Taylor

and eviscerate the policy considerations therein identified." Atherton at 531. The plaintiff failed to meet his burden and the trial court's order should be affirmed.

D. Any negligence by Clark County in issuing the permit was not a proximate cause of the plaintiff's injuries.

Proximate cause consists of two elements, cause-in-fact and legal causation. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (2006). Cause-in-fact is "a cause which in a direct sequence unbroken by any new or independent cause produces the injury complained of and without which such injury would not have happened." Lynn v. Labor Ready, Inc., 136 Wn.App. 295, 151 P.3d 201 (2006). "While the issue of proximate cause is ordinarily a question for the jury, 'when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion then it may be a question of law for the court.'" Fabrique v. Choice Hotels International, Inc.,144 Wn.App. 675, 683 151 P.3d 201 (2006), *citing,* Bordynoski v. Bergner, 97 Wn.2d. 335, 340, 644 P.2d 1173 (1982).

The county's alleged negligence consists of failing to obtain proof from NSM that arrangements had been made with CPU for any necessary disconnection of utilities. The following is a chronology of the activity that occurred before the house move:

2/15/05	NSM sends fax to CPU regarding moving two houses indicating that each house has a loaded height of 17'2". *CP 573-5.*
2/16/05	Robert Hinkel (CPU Associate Design Engineer) receives NSM's fax. *CP 577.*
2/18/05	Robert Hinkel travels to house move route to check poles that need to be moved. *CP 577.*
2/21/05 (week of)	Robert Hinkel discusses with NSM the house move route; the need for a CPU standby crew; and cost of moving utility poles. *CP 577.*
3/2/05	Robert Hinkel discusses with NSM the width of the houses and the movement of utility poles. *CP 577.*
3/9/05	Robert Hinkel checks house move route for "obvious clearance concerns"; flags poles to be moved. *CP 577.*
3/10/05	Robert Hinkel creates work order for CPU to move poles. *CP 577.*
3/14/05	Robert Hinkel discusses timing of house move with NSM; agree on April 3 move date and need for advance payment. *CP 577.*
3/18/05	NSM pays CPU. *CP 577.*
3/18/05	Clark County receives two applications for two house moves from NSM. *CP 40.*
3/22/05	Robert Hinkel sends construction packet to Don Lidrazzah (CPU Operations). *CP 577.*
3/31/05	Robert Hinkel talks to NSM regarding status of work. *CP 577.*
4/1/05	CPU moves utility poles for house move. *CP 908.*

4/1/05	Clark County issues permit for first house move. *CP 75.*
4/3/05	First house move occurs without incident, accompanied by WSDOT employee, Chris Vigna. *CP 160-1; CP 566.*
4/7/05	Clark County issues permit for second house move. *CP 76.*
4/7/05	WSDOT issues permit for second house move. CP 568-9.
4/10/05	Second house move occurs, accompanied by WSDOT employee, Chris Vigna. *CP 160-1; CP 564.*

These facts are undisputed. As this chronology demonstrates, NSM had, in fact, made all the arrangements CPU required prior to the county issuing the permit in question. It is difficult to understand how the failure to require proof of arrangements, that had in fact been made, directly caused the plaintiff's injuries.

CPU's associate design engineer, Robert Hinkel, testified that the owner of NSM told him that she and her husband drove and measured the route and there were no conflicts with CPU overhead lines. *CP 582.* Mr. Hinkel also testified when he checks for conflicts, he would "stop and measure anything that looks like it might be questionable;" and that he had driven portions of the route looking for "anything that jumped out at me" and he did not see any. *CP 581, 832.* He further testified that the minimum height for utility wires is 18 feet and the indicated height of the house being moved was 17 feet 2 inches. *Id.* Mr. Hinkel testified:

> Because, like I say, the minimum clearance that we're required to have is 18 foot. And if they're 17 feet 2 inches, they're OK, and if they're 17 feet 6 inches, they're OK, but it goes back to whether it's the summer, the winter, is it raining, is it snowing, is it bright and sunny. I mean these wires can fluctuate from – anytime you measure them, they can fluctuate a few inches.
>
> 17 feet 2 inches is, as long as everything meets code and your system's built right, 17 feet 2 inches actually isn't an issue.[10]

CP 582. The wire that injured the plaintiff was more than 23 feet above the ground. *CP 143.* The plaintiff does not show how the county's requiring proof of arrangements with CPU would have changed anything. The undisputed facts are that, simply put, CPU knew of the move for more than a month before the county issued its permit and made the necessary arrangements with the house move. Mr. Hinkel, as the person reviewing the move for CPU, would not have required the disconnection of a wire 23 feet above the ground when he believed that an 18 foot wire height was "OK" for this house move.

The plaintiff has not established that the failure to require additional proof of the arrangements made with CPU directly produced his injury. "Cause in fact" refers to an actual "but for" cause of the injury.

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[10] *See,* Deposition of Robert Hinkel at page 86, attached as "Exhibit F" to the *Declaration of E. Bronson Potter.*

Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998). The plaintiff did not show how "but for" the county's actions his injury would not have occurred. Instead, the plaintiff's electrical engineer theorized that if the county had required more proof from NSM, then doing so "should have encouraged the utilities, especially Clark Public Utilities, to do a more thorough analysis of this project." *CP 144.* This statement is mere conjecture. In Theonnes v. Hazen, 37 Wn.App. 644, 681 P.2d 1284 (1984), the Court of Appeals affirmed a summary judgment in favor of the defendant when the plaintiff's expert opinion was based on speculation. "The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." Theonnes at 648. *See also,* Melville v. State, 115 Wn.2d 34, 41, 793 P.2d 952 (1990); and Group Health Coop of Puget Sound v. Dept. of Rev., 106 Wn.App. 391, 400, 722 P.2d 787 (1986).

Legal causation rests on considerations of policy and common sense as to how far the defendant's responsibility for the consequences of its actions should extend. The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter. Taggart v. State, 118 Wn.2d 195, 218, 225-26, 822 P.2d 243

(1992). The trial court properly determined that the county did not have the authority or duty to regulate house moves on state highways. *CP 692.* Having answered the question of duty by holding that the county had no duty with respect to conditions on state highway or the permitting of the move on the state highway, the answer to the question of legal causation logically follows. There is none.

The plaintiff did not meet his burden of establishing either cause in fact or legal causation. The undisputed evidence is that NSM made arrangements with CPU for the house movement before the county issued the permit. If there was any failure by the county official (and the county disputes that there was a failure), such failure did not produce the plaintiff's injuries in a direct, unbroken sequence. The granting of the motion for summary judgment was proper.

E. The trial court properly determined that the public duty doctrine does not apply to CPU's review of the house move.

The public duty doctrine does not apply where a governmental entity performs proprietary functions. Stiefel v. City of Kent, 132 Wn.App. 523, 529, 132 P.3d 1111 (2006), *citing,* Bailey v. Town of Forks, 108 Wn.2d 262, 268, 737 P.3d 1257 (1987). A public utility district acts in a proprietary capacity when exercising its authority to contract, set rates and maintain facilities. Sundquist Homes v. Snohomish PUD #1, 140

Wn.2d 403, 997 P.2d 915 (2000). Governmental functions are those generally performed exclusively by government entities. Stiefel at 529.

An example of a governmental function to which the public duty doctrine applies is the issuance of building permits. Taylor at 164-65. Unlike Clark County, CPU was not engaged in permit issuance with respect to the house move. As stated in its answer to interrogatories, "Clark Public Utility District does not issue permits for house or structures moved . . . ." *CP 949.*

An electrical utility provides electricity to customers who request this service and pay rates for the electricity provided. Acting in this capacity, CPU performs a proprietary function, rather than acting "for the common good of all," as suggested by CPU.[11] Okeson v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003); Tacoma v. Taxpayers of Tacoma, 108 Wn.2d 679, 694, 743 P.2d 793 (1987).

This case should not be confused with the cases involving street lights and fire hydrants, which provide light and water for the general public without charge. In this case, CPU was concerned about the integrity of its electrical distribution system, which provides electricity to

[11] *See*, CPU's Opening Brief at page 13.

rate payers. *CP 874.*

CPU reviewed the proposed house move; moved electrical facilities and charged NSM for this service. Acting in this capacity, it was essentially aiding and cooperating with a private entity for the benefit of that private entity rather than the public. In doing so, it was serving a proprietary, rather than a governmental action. Borden v. City of Olympia, 113 Wn.App. 359, 371, 53 P.3d 1020 (2002), *rev. denied,* 149 Wn.2d 1021 (2003).

At most, CPU has established that there may be a factual dispute as to whether its activity should be characterized as governmental or proprietary. Former CPU employee, Mr. Dilling, testified that review of house moves was undertaken by CPU to protect CPU's own property, as well as to protect property of persons along the route and the safety of workers involved. *CP 874.* Mr. Hinkel testified that the purpose of CPU's review was to protect its equipment and further the safety of the contractor and general public. *CP 934.* CPU's statement that CPU was not "performing any proprietary function, such as protecting its facilities for the benefit of utility customers"[12] is simply incorrect. Mr. Hinkel's

[12]*See*, CPU's Opening Brief at pages 15-16.

testimony was specifically that a purpose of reviewing the house move was to avoid power outages and to fulfill their "responsibility for customer reliability." *CP 934.*

Given the conflict in the evidence regarding the purpose of CPU's purpose of the house move, the trial court did not error in denying CPU's motion for summary judgment on the applicability of the public duty doctrine. Where the existence of a duty depends upon facts that are in dispute, summary judgment is inappropriate. Sjogren v. Props. Of the Pac. Nw., LLC, 118 Wn. App. 144, 75 P. 3d 592 (2003); Kinney v. The Space Needle Corp., 121 Wn. App. 242; 85 P.3d 918 (2004); Afoa v. Port of Seattle, 160 Wn. App. 234, 247 P. 3d 482 (2011).

V. CONCLUSION

No one questions the serious nature of the plaintiff's injuries. However, the county is not liable for those injuries because they resulted from an accident that occurred on a state highway during a house move that was undertaken pursuant to a permit issued by the state. The county had no duty to address those conditions and no authority to regulate the house move on the state highway.

The plaintiff advocates for the abolition for the public duty doctrine. This Court recently determined that controlling precedent

prevents it from doing so. Claims for negligent permit issuance are precluded by the public duty doctrine, unless an exception applies. The failure to enforce the exception does not apply in this case.

The trial court properly denied CPU's motion for summary judgment. The public duty doctrine did not apply to CPU's activities because it was acting in a proprietary capacity. In the alternative, material factual disputes made summary judgment inappropriate.

The trial court's order granting Clark County's motion for summary judgment should be affirmed. The trial court's order denying CPU's motion for summary judgment should also be affirmed.

DATED this 9TH day of March, 2012.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on this 9th day of March, 2012, I, Thelma Kremer, caused true and correct copies of the foregoing *Brief of Respondent Clark County* to be served upon counsel of record as follows:

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DATED this 9th day of March, 2012.

Thelma Kremer

CLARK COUNTY PROSECUTOR

March 09, 2012 - 3:32 PM

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